

DATE ISSUED: August 18, 1999

In the Matter of:

EDWARD GOLDEN,

Claimant

v.

CONTINENTAL GRAIN COMPANY

Employer

and

CIGNA INSURANCE COMPANY,

Carrier

Case No. 1998-LHC-2858

OWCP No. 7-118064

APPEARANCES:

JAMES E. CAZALOT, JR., ESQ.
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For Claimant

DOUGLAS P. MATTHEWS, ESQ.
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For Employer/Carrier

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.*, (the "Act") and the regulations promulgated thereunder. This claim is brought by Edward Golden, Claimant, against his former employer, Continental Grain Company, Employer, and its insurance carrier, CIGNA Insurance Company, Carrier. A hearing was held in Metairie, Louisiana on April 13, 1999 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

- 1) Court's Exhibit No. 1;
- 2) Claimant's Exhibits Nos. 1-44; and
- 3) Respondent's Exhibits Nos. 1-20.¹

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

- (1) That an injury/accident allegedly occurred on April 22, 1990;
- (2) That the fact of the injury/accident is not disputed;
- (3) That there was an employer/employee relationship existing at the time of the alleged injury;
- (4) That the alleged injury arose in the course and within the scope of employment;
- (5) That the date the Employer was notified of the injury was April 22, 1990;
- (6) That the date of notification of the injury/death pursuant to Section 12 of the Act and the Secretary of Labor, LS-203 filed July 13, 1990
- (7) That an informal conference was held on August 4, 1998;
- (8) That disability resulted from the injury;
- (9) That medical benefits and disability benefits were paid;
- (10) That Employer paid \$127,285.59 in medical benefits; temporary total disability benefits of \$173,206.22 from April 22, 1990 until May 6, 1998 and of \$5,787.32 from January 7, 1999 until April 13, 1999; and permanent partial disability benefits of \$8,401.36 from May 7, 1998 until January 6, 1999;

¹ The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

(11) That the Notice of Controversion was filed on July 14, 1998 ; and

(12) That Claimant's average weekly wage was \$620.08.

Issues

The unresolved issues in this proceeding are nature and extent, maximum medical improvement, medical benefits for psychiatric care and treatment for stroke.

Summary of the Evidence

Testimonial Evidence

Edward L. Golden, Sr.

Edward Golden, Claimant, testified that he was an electrician for Respondent whose duties included walking six-inch beams, climbing vertical ladders, and moving large motors up steep inclines using a dolly and a come-a-long. He added that his position included walking six to seven hours a day. He stated that he operated electronic equipment, but did not "work on them." TR 14-19.

Claimant testified that he stopped working for Respondent in 1990 when he injured his back in an on the job accident. He stated that, resultingly, he has consistent lower back pain and groin pain with occasional spasming. Claimant testified that prior to the surgery the spasming ran primarily into his right leg, and post surgically ran into his left leg. He stated that since the accident the nature of his pain, which is sharp and stabbing, has not changed, but it did increase in severity post surgical. Claimant testified that if he walked more than fifteen minutes he would "feel like somebody takes their hands and grabs me right there and starts pulling me to the floor." He stated that on occasion the pain is so great that "I'd almost cry." Claimant testified that his pain is worse today then it was twelve months ago. He stated that although Dr. Manale prescribed a corset in 1990, the corset did not alleviate his pain. Claimant testified that he underwent a number of epidural morphine steroid injections. He stated that he gets relief by sitting or lying down. Claimant testified that he was forced to lie down several times a day. He stated that he takes up to ten medications a day including Vicodin, Neurontin, Tranxene, Prozac, Phenobarbitol, Covera, Vasotec, and Prilosec. Claimant testified that he takes the aforementioned medications which cause him to be confused at times and sleepy all the time. TR 19-28.

Claimant testified that he cannot stand for more than ten or fifteen minutes and then must sit or lie down. He stated that he does not sleep more than three hours at a time. Claimant testified that although he does take amitriptyline for sleep, he awakens due to pain on turning over. He stated that his gait has deteriorated over the past twelve months. TR 31-33.

Claimant testified that his current treating physicians are Dr. Frigon and Dr. Manale. He stated that both Dr. Frigon and Dr. Manale recommended that he see a psychiatrist. TR 34, 35.

Claimant testified that he applied for the maintenance supervisor position in El Dorado, the maintenance supervisor at Arkansas Employment Services, R&R Electronics, the position with the post office, the positions with Dillard's and Radio Shack, the guard position at Georgia Pacific, and the position with Executive Business Products in Monroe given to him by Ms. Seyler. He added that he applied at all three Monroe positions on the same day, July 2, 1997. He stated that for the majority of the positions he was told that they would call him. Claimant testified that he did apply for the guard position at Georgia Pacific paper mill with Burns Security after having great difficulty in contacting Roy Farrow. Claimant testified that when speaking to Jack Reynolds relative to the R&R Electronics position he was very frank about his physical disabilities because he believed that Mr. Reynolds represented an employment service as there was no sign other than an employment service sign on the office. He added that the letter from Mr. Reynolds stating that he was not interested in working was not a fair representation of his interview. He stated that when he called the number indicated by Ms. Seyler for the postal worker, the party informed him that he would have to pay \$45 for the application which he could not afford. Claimant testified that he failed the test given by Executive Business Products and was given a letter stating that he was not qualified for the position. He stated that as he was completing the application for the guard position at Georgia Pacific he observed the guards climb up the trucks to check for theft. Claimant testified that every vehicle he observed leave the plant was inspected. He stated that he did not apply for the position with Arlington Cemetery in funeral services. Claimant testified that he did not apply for the jobs at Notoco Industries and Allied Electronics in New Orleans. TR 36, 37-45, 105, 108, 110, 117, 150-152.

Claimant testified that for the last twelve months he has had no desire to interact with people. He stated that he sees only his brother and his son regularly. Claimant testified that the most active endeavor he has carried out in the last twelve months is going to the grocery store where the attendants carry your groceries. He testified that his driving is limited to Crossett and that he did not drive to the job interviews. TR 45, 46, 105.

Claimant testified that he moved to Crossett, Arkansas because the cost of living was lower than in New Orleans. He stated that he has returned to New Orleans for his father-in-law's funeral and to take his mother-in-law to see Dr. Manale. TR 50, 54.

Claimant testified that Georgia Pacific ran five plants in the same area in Crossett, Arkansas. TR 92.

Claimant testified that he was a union electrician licensed in Jefferson and Orleans parishes in Louisiana. He stated that he was trained in electronics in the military, but did not work in that field outside military service. TR 96-98.

Claimant testified that he began to have headaches in 1994 and 1995 due to an increase in his blood pressure. TR 100.

Claimant testified that he saw Dr. Martin for a total of about twenty minutes. He stated that Dr. Martin asked him what he was doing there and related that he did not have any of his records.

TR 118, 119.

William Albert Martin, M.D.

Dr. William Martin, a board certified expert in the field of neurology, testified that he examined Claimant on March 2, 1999. He stated that Claimant had suffered a lacunar stroke which left him with temporary mild left hemiparesis which has since abated. Dr. Martin testified that Claimant had some numbness of the left foot and lower leg which he attributed to a previous surgery. He stated that he did not believe that there was a causal relationship between Claimant's work accident and the onset of the stroke. Dr. Martin testified that the number one risk factor for a stroke is hypertension particularly the small vessel or lacunar stroke experienced by Claimant. He stated that emotional stress can elevate blood pressure. TR 57, 60-64, 74, 76.

Dr. Martin testified that he believed that Claimant could perform the position of salesperson for Family Services, which involved attending services and making arrangements for funerals with family members, and the position of gate guard as it did not involve walking. He stated that he did not believe that Claimant could execute the duties of the maintenance worker or the pre-need customer service representative. He added that if the job descriptions that were proffered to him were inaccurate, then his opinions were inaccurate. Dr. Martin testified that if the guard position included roving patrols exceeding fifteen minutes than it would exceed Claimant's limitations. Dr. Martin testified that Claimant could perform a sedentary type position with alternating sitting and standing. TR 67, 68, 79, 81.

Dr. Martin testified that he did prescribe medications such as Vicodin, Neurontin, Prozac, phenobarbitol, Tranxene, amitriptyline, Vasotec, and Prilosec. He stated that the side effects of these medications in dosages taken by Claimant would be drowsiness and nausea. He added that the side effects should wane as the medication was continued. Dr. Martin testified that he only saw Claimant once, but did not notice, nor did Claimant complain of, any of the noted side effects. He stated that side effects could include unsteadiness, staggering, difficulty in conversing, and falling asleep during a conversation. Dr. Martin testified that Claimant did not fall asleep during his examination, nor did he stagger or exhibit drowsiness. TR 68-74, 82, 83.

Dr. Martin testified that he did treat some patients for depression. He stated that Claimant did not appear to be "particularly depressed" when he examined him. Dr. Martin testified that depressed individuals have good days and bad days. He stated that a physician who examined Claimant multiple times would be in a better position to diagnose depression. TR 77, 78.

Edward Golden, Jr.

Edward Golden, Jr., Claimant's son, testified that he has worked as an assistant winder operator at the Georgia Pacific tissue mill in Crossett, Alabama. He stated that as a chief steward for the union he is responsible for 132 people. Mr. Golden testified that his job includes extended time at the safety office at the main gate. He stated that he observes the gate guards performing their duties which includes climbing into the trailers to check the manifest and insure that what is being

brought in or taken out is what is on the manifest. He added that he has observed guards checking the cabs and crawling into the sleepers to inspect them. Mr. Golden testified that he has observed guards in the pump area climbing down a four foot ladder to inspect the pumps. He stated that he did not know of any disabled guards on staff at the plant and had questioned whether or not there was a handicapped program at the plant for a friend. He added that he was informed that there was no such program available. TR 121-129.

Mr. Golden testified that he learned of his father's accident when his father missed work, something he never did, and was told that he had injured his back at work the day prior. He stated that prior to his injury his father socialized extensively with neighbors, did gratuitous electrical for neighbors, and enjoyed attending Saints games. Mr. Golden testified that since his accident his father has become more and more withdrawn. He stated that his dad is inactive and goes from the bed to the couch and back to the bed. Mr. Golden testified that after ten minutes of walking around his yard, his father has to lie down. He stated that his father's movements particularly getting in and out of his truck connote that he is in pain. Mr. Golden testified that his father does not complain, but takes "pain medication a lot." He stated that his father walks bent over and has done so for a long time. Mr. Golden testified that his father does not sleep more than two or three hours at a time. TR 130-133.

Mr. Golden testified that his father does not participate in conversations as he did prior to his accident and appears to evidence a diminished attention span. He stated that his father has fallen asleep during conversations. He added that his father could talk, but had a short attention span which was not evidenced in his testimony. Mr. Golden testified that he has observed his father, particularly in the morning and evening when he takes his medication, bump into the walls as he walks down the hall in his home. He stated that his father is no longer the happy, outgoing person he was before his accident. Mr. Golden testified that he attempted to take his father to a hockey game, but had to leave before the first period was over due to his father's back pain. He stated that he rarely sees his father laugh anymore and has on occasion witnessed him crying. TR 134-137, 144, 146.

Mr. Golden testified that he escorted his father to Dr. Martin for evaluation. He stated that his dad was with the doctor only twenty to thirty minutes. TR 138.

Carla Seyler

Carla Seyler, an expert in the field of rehabilitation counseling, testified that she had been contacted by CIGNA to perform rehabilitation counseling and job placement for Claimant. She stated that she interviewed Claimant at his home on April 1, 1997. Ms. Seyler testified that she identified positions for Claimant based on his past skills as an electrician and a foreman and the restriction to light sedentary work recommended by Dr. Rutherford. She added that she did not rely on the functional capacity evaluations performed in Arkansas which indicated that Claimant could not stand or walk for more than fifteen minutes. Ms. Seyler testified that the therapist who performed the functional capacity evaluations questioned whether Claimant could be competitively employed. She stated that in hindsight some of the jobs she identified did not fall into Claimant's sedentary restriction. She stated that Claimant had applied for all identified positions presented to him on June

27, 1997 by July of 1997. TR 153-158, 168, 169.

Ms. Seyler testified that she did a subsequent job search in Crosset, finding two positions approved by the doctors.² One of the approved positions was for an unarmed security guard and the other was in sales for a funeral home. Ms. Seyler stated that Mr. Farrow of Burns Security told her personally that one guard in each shack handles inspecting trucks and the other handles only paperwork. She stated that an applicant could specify the “paperwork only” sedentary position on application. Ms. Seyler testified that as of April 27, 1998 Mr. Farrow indicated that Claimant had not applied to them. She stated that Mr. Farrow told her that he was willing to consider Claimant for employment despite his limitations. The security position paid \$6.50 per hour. Ms. Seyler testified that after her conversation with Jack Reynolds of R&R Electronics she had a clear understanding that he had a bench job. She stated that she was aware that Mr. Reynolds testified that Claimant would not fit any job he had. Ms. Seyler stated that she was aware that when Claimant met with R&R Electronics he believed that he was meeting with a representative of an employment agency. She stated that in her deposition of January 8, 1999 she did state that the position at Dixie Maintenance was only an anticipated opening not an immediate opening. Ms. Seyler testified that the contact number she supplied to Claimant for the post office position was incorrect. She added that when he called the number, he was told that he would have to pay to submit an application. She stated that although Mr. Reynolds was of the opinion that Claimant did not want to work, no other employer stated that Claimant presented himself in such a negative way. TR 159-161, 163, 165, 166, 168, 170-174.

Ms. Seyler testified that the position with Arlington Cemetery was frowned upon by Dr. Frigon because of Claimant’s depression and the position mandated dealing with grieving individuals. She stated that of the four jobs identified in 1998 two were with the funeral home, one was a maintenance job and one was as a security guard. These four jobs were presented to Dr. Frigon and later Dr. Martin, but not Dr. Rutherford. Ms. Seyler testified that the maintenance job and one of the positions at Arlington Cemetery were rejected by both Drs. Frigon and Martin. Ms. Seyler testified that Dr. Rutherford approved the positions at Radio Shack and Dillard’s in Monroe. She stated that the job description to Dr. Rutherford did include that the job required standing and walking and included breaks, but did not include any indication as to when the breaks were allowed. She added that the position entailed an eight hour day with breaks and a lunch break. Ms. Seyler testified that with Claimant’s physical and emotional problems she believed he could perform the jobs at Burn’s Security and the jobs most recently identified in New Orleans. She stated that falling asleep on the job or needing to lay down would not be acceptable for these positions. TR 174, 175, 176-179.

Ms. Seyler testified that Claimant scored 14.2 grade level in reading comprehension, 13.6 in word recognition, and 12.2 in calculation on the Woodcock Johnson Revised Test of Achievement.

Ms. Seyler testified that she identified available positions for Claimant in New Orleans as an appointment setter for a siding company, a cab dispatcher, and two positions as a parking lot cashier.

²Ms. Seyler did not, at this point identify the doctors.

She stated that she discussed Claimant's limitations with all those offering the positions and garnered detailed information concerning the complexity of the job tasks to ensure they met Claimant's limitations. Ms. Seyler testified that the wage levels ranged from \$5.15 to \$6.00 per hour. TR 163-165.

Jacquelyne Frigon, M.D.

Dr. Jacquelyne Frigon, a neurologist and Claimant's treating physician, testified by deposition, that she first saw Claimant in 1995 upon referral from Drs. Gresham and Walsh in Crosset because Claimant was not functioning well due to a great amount of pain in his back and legs. Dr. Frigon stated that she has garnered medical information on Claimant from Drs. Rutherford and Manale. CX-39 pp.5-7.

Dr. Frigon testified that when she initially saw Claimant he was not able to stand or sit for any length of time or walk any distance. She stated that Claimant had very little function relative to walking, flexibility in his back, and endurance. Dr. Frigon stated that initially she diagnosed decreased flexion and extension in his back, some claudication, and some radiculopathy. She stated that there was a significant component of depression related to his lack of functioning and his pain. Dr. Frigon stated that after performing an EMG she ruled out nerve root irritation and radiculopathy. She stated that Claimant has what is known as a mechanical back problem which is related to bone and muscles rather than nerve roots. Dr. Frigon testified that she initially prescribed Prozac for the depression and for chronic pain, later adding Neurontin for the pain. CX-39 pp.8-11.

Dr. Frigon testified that she reviewed Claimant's functional capacity test, performed in 1994 by Tod Dalby, which opined that Claimant was capable of performing sedentary work, participate in a work reconditioning program, and use a TENS unit. CX-39 pp. 11-13.

Dr. Frigon testified that Claimant was improving with exercising before suffering a stroke, diagnosed by Claimant's clinical symptom's, in December 1996 which induced weakness and numbness on his left side. She opined that Claimant's stroke was caused by his hypertension, decreased activity, and increased smoking under stress. Dr. Frigon testified that Claimant had never had malignant high blood pressure prior to his accident. She added that individuals with Claimant's profile, going from a very active lifestyle to very sedentary, are the individuals that have strokes in their fifties. She stated that since the stroke Claimant is on blood thinners and more aggressive treatment for his high blood pressure. Dr. Frigon testified that Claimant's condition deteriorated after his stroke. She stated that his depression increased and she increased his Prozac. Dr. Frigon testified that but for an increase in Claimant's emotional lability, he had no continuing residual effects of his stroke. CX-39 pp. 14-18, 22, 23.

Dr. Frigon testified that a major component of Claimant's depression was related to his pain and decreased activity. She stated that his decreased exercise and his stress level is very intense at times and some of that is related to his Workmen's Compensation claim. Dr. Frigon testified that Claimant has intervals where his blood pressure is very well controlled and his activities are increased. CX-39 pp. 20, 21.

Dr. Frigon testified that she was not offered employment positions to review for Claimant until May 1, 1997. She stated that she reviewed the positions in light of Claimant's physical injury only approving the maintenance supervisor and production supervisor positions. Dr. Frigon testified that she reviewed a subsequent list of positions on March 19, 1998 approving the positions of gate guard and funeral director while not approving positions as maintenance worker and customer service representative.³ CX-39 pp. 26-31.

Dr. Frigon testified that when she approved the positions for Claimant she was strictly addressing his back problems because under Arkansas Worker's Compensation you can only address the injury stemming directly and solely from the work related injury, but did not address Claimant's depression or his pain. She stated that in addressing Claimant's back injury with the addition of the hypertension and emotional problems that have stemmed from the injury, she believed that Claimant would not have the mental and physical ability to be in sales. She added that after his stroke Claimant's reasoning ability and his ability to cope with daily life had diminished. This problem was exacerbated by the multiplicity of medications he was prescribed. Dr. Frigon testified that based only on his back injury Claimant may physically be able to perform as a gate security guard or a gas station cashier if there was no possibility of stress and he was able to move around, but she added that Claimant's pain would preclude him from performing any of these positions.⁴ She stated that the small cubicles used for most cashiers would not be acceptable. She added that Claimant's judgment is impaired and he could not respond appropriately to problems. Dr. Frigon testified that Claimant's condition is deteriorating both mentally and physically. Dr. Frigon testified that as of June 1998 she considered Claimant 100% disabled. CX-39 pp. 36, 39, 40, 42-45, 70.

Dr. Frigon testified that she was familiar with Dr. Rutherford, as was everyone in Arkansas, as he was known as a Workmen's Compensation doctor. She stated that she had selected a center for Claimant's functional capacity evaluation to be done, but Dr. Rutherford directed Claimant to another center, the Physical Assessment Center (PAC) for the evaluation. Dr. Frigon testified that the PAC was associated with Dr. Rutherford. She stated that on June 12, 1996 the PAC found that, based on Claimant's valid functional capacity evaluation, it appeared that he would not be able to tolerate consistent employment at that time. She added that she believed that this judgment was still valid today. Dr. Frigon testified that in December 1995, she opined that Claimant would not be able to return to gainful employment. She stated that she did not release Claimant to return to work and did not approve any jobs before she received the initial job descriptions from the vocational worker in May 1997. Dr. Frigon testified that from the time she began to treat Claimant in 1995 until his stroke in December 1996, she had not released him to return to any form of work. She stated that since Claimant's stroke he has regressed and his condition is as bad or worse than when she first evaluated him in 1995. CX-39 pp. 50-59, 81.

³Dr. Frigon noted that she approved the funeral director's position with a caution that Claimant was under treatment for depression. CX-39 p.31.

⁴Dr. Frigon noted that she did not originally factor in Claimant's pain because it is not allowed under Arkansas Worker's Compensation law. CX-39 p.69.

Dr. Frigon testified that Claimant's facet joint problem is worse today than when she first examined him. She stated that during periods of heightened stress Claimant has increased muscle spasm, decreased exercise, decreased flexibility. Dr. Frigon stated that although Claimant does not have radiculopathy related directly to nerve root problems, she believed he did have radiculopathy related to muscle spasming irritation nerve roots which does not manifest on an EMG. She stated that she believed that Claimant's back problems and his radiculopathy were caused by his work related accident. Dr. Frigon testified that Claimant's decreased activity because of his work accident aggravated the claudication problem. She added that in her medical opinion Claimant was depressed CX-39 pp. 60-63, 68.

Dr. Frigon testified that a determination of depression is based on meeting the criteria under DSM-IV. She stated that once a diagnosis of depression is made, an individual is considered disabled if their psychomotor activity, particularly their cognitive skills, are diminished to the point that they could not function in a work environment. Dr. Frigon testified that it was recognized by the Workmen's Compensation board that psychiatric intervention was needed. She stated that as a physician, she believed that Claimant is severely depressed and if she were a psychiatric medical expert would be opining that Claimant is not capable of carrying out employment. Dr. Frigon testified that there was a period of time when Claimant was depressed to the point of harming himself. CX-39 pp. 72-75.

Bernard Manale M.D.

Dr. Bernard Manale, an expert in orthopedic surgery and Claimant's treating orthopedist, testified that he first saw Claimant on April 20, 1990. Claimant presented with back pain due to a work related accident. Upon physical exam, Dr. Manale diagnosed tenderness in the lumbosacral region, restricted motion, and some spasm. There was an absence of neurologic findings with normal reflexes. A MRI performed on May 24, 1990 exhibited a disc protrusion at L4-5 and a subsequent myelogram on June 8, 1990 exhibited the same with probable nerve root impingement. A subsequent CT corroborated these findings. Dr. Manale testified that after using conservative treatment including a corset and epidural morphine injections without success in alleviating Claimant's significantly disabling pain, he opined that extensive surgery was indicated to relieve a major component of Claimant's pain. A second opinion by Dr. Nutik confirmed the necessity for surgery. CX-40 pp. 3, 4.

Dr. Manale testified that he performed a decompression and fusion on May 14, 1992. Dr. Manale testified that Claimant's anxiety and depression prompted him to recommend psychological treatment. He stated Claimant had some immediate improvement in pain and improved until early 1993. However, a CAT scan in March 1993 evidenced epidural fibrosis or scar tissue resulting from the surgery. Dr. Manale testified that in March 8, 1994 he did an impairment rating on Claimant and found him to be impaired 30% to 40% as to the body as a whole. He added that this rating was based on the physical aspects only and was not a functional rating. Dr. Manale stated that functionally Claimant was disabled from any kind of physical work because he has no tolerance for walking or sitting, he is depressed and taking narcotic medication which depress the cerebral function. The medications impair just about any function requiring alertness. He opined that Claimant would not

be a good employee. CX-40 pp. 4, 5.

Dr. Manale testified that most recently he examined Claimant on March 3, 1999 finding a lack of normal lordosis due to spinal pain and tender, rigid muscles due to fibrosis, spasm, or both which restricted his motion. He stated that he would caution Claimant relative to further surgery because of the fibrosis caused by his prior surgery and the small chance of a positive response to a second surgery. Dr. Manale testified that unless there was “something really significant that we do not know about, I do not have anything else to offer him.” He stated that Claimant’s pain may be relieved by an implantable pain control device or a spinal cord stimulator. Dr. Manale testified that he believed that Claimant would remain in his present condition. He stated that he was not sure what advantage would be given to trying to return Claimant to employment. He added that he personally did not believe that it would happen. Dr. Manale testified that his medical opinion as treating physician was that Claimant could not return to work due to his significant organic problem. Dr. Manale testified that the objective medical tests performed support Claimant’s subjective description of intense pain. He stated that he agreed with the determination by Georgia Abner in 1996 based on an FCE that Claimant could not tolerate consistent employment. Dr. Manale testified that he currently held that same opinion. CX-40 pp. 5-10.

Jack Reynolds

Jack Reynolds testified by deposition that he was an electrician by trade and president of R&R Electronics. Mr. Reynolds testified that R&R Electronics has an office in a building which he owns at 205 Fairview. He stated that his office staff consists of a secretary. Mr. Reynolds testified that there is no sign designating R&R Electronics at the building, therefore there is no way for an individual to know that R&R Electronics is located in that building. He stated that there is an employment agency that that works out of the same building. CX-43 p.5, 6, 13, 19.

Mr. Reynolds testified that he employs six electricians doing primarily industrial work involving “pulling” power wires and machine drives. He added that the motors that he services range from 100 to 2,000 pounds. Mr. Reynolds testified that the larger motors are moved by lift trucks, but the motors must be positioned manually. He stated that he had a contract with a company to repair and maintain their two-way radios. Mr. Reynolds stated that the technician who performed that service also worked as an industrial electrician and sometimes welder spending only four or five hours a week servicing the radios. He stated that he has never had a position in his business which allowed an employee to stay in shop. Mr. Reynolds testified that he did not tell anyone that he had such a position open. CX-41 pp. 7-11, 18.

Mr. Reynolds testified that he did not recall Carla Seyler contacting him for a position for Claimant. He stated that he never had a position for someone working at a bench in a shop with a lifting restriction of ten pounds, no climbing, bending, or stooping with the requirement for alternate sitting and standing. Mr. Reynolds noted that in 1997 he was looking for a “mechanical man with welding ability”, but did not advertise for the position. He stated that he did recall Claimant coming into his office. Mr. Reynolds testified that Claimant stated that he did not know why they sent him there as he could not do anything except bench work, could only work two hours a day and then go

to bed or reposition, and he could not work for the stated salary. CX-41 pp. 14-17, 20.

Johnny Golden

Johnny Golden, brother of Claimant, testified by deposition, that he worked at Georgia-Pacific for twenty-six years, retiring in 1995. He stated that he speaks to Claimant daily and sees him every other day. He stated that Claimant walks "kind of bent over." Mr. Golden testified that Claimant can sustaining mowing on a riding mower for a maximum of six to ten minutes. He stated that he has not observed Claimant engaged in any other type of activity. Mr. Golden testified that he or Claimant's son drive him to his doctors' appointments. He added that he and Claimant's son do the "chores around the house" for Claimant and mow the lawn. Mr. Golden testified that Claimant always appears worried. CX-42 pp. 5-7, 12, 17.

Mr. Golden testified that he believes his brother is in pain, although he has never verbally complained of pain, because after a ten minute attempt at mowing his lawn he must take medication for pain and lie down and rest. He stated that when he visits Claimant he is usually lying down. CX-42 9, 10.

Mr. Golden testified that Claimant visits him to pick up his mail and stay about fifteen or twenty minutes. He stated that on occasion he brings Claimant his mail. Mr. Golden testified that Claimant told him that he applied for jobs within fifty miles of Crosset. CX-42 pp. 11, 12.

Mr. Golden testified that he has observed the security guards at the Georgia-Pacific gates. He stated that the guards stop the trucks and look through the trucks and the trailers. CX-42 p. 19.

Thomas Moon

Mr. Moon testified by deposition that he works in maintenance at the paper mill. He stated that he is Claimant's landlord. Mr. Moon testified that he has not observed Claimant performing any work around the house. He stated that when he visits Claimant he is usually sitting in his living room. Mr. Moon testified that he has not seen Claimant lying down after coming to the door and letting him enter. CX-43 p. 4-7, 9..

Mr. Moon testified that he has observed the guards at the front gate of the paper mill checking vehicles. He stated that they check behind the seats and look into the trunk. He added that the guards usually check the vehicles from the ground. CX-43 p.8, 9.

Additional Medical Evidence

Gordon P. Nutik, M.D.

In a report dated March 20, 1992, Dr. Nutik opined that Claimant stated that there was pathology at the L4-5 level and believed that decompression of the level was appropriate. RX-3 p. 1-3.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

I. Maximum Medical Improvement

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979). However, if the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15(1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708(1978).

This Court finds that Claimant achieved maximum medical improvement on September 23, 1996. After last examining Claimant on March 3, 1999, Dr. Manale stated in his deposition of March

22, 1999 that "I do not have anything else to offer him." Dr. Manale added that Claimant's complaints were consistent with those observed on his last visit. Evidence establishes that Claimant's last visit was September 23, 1996. Based on the aforementioned evidence, this Court finds that maximum medical improvement was reached and Claimant's disability became permanent on September 23, 1996.

II. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

It is undisputed that Claimant is unable to return to his former employment due to a work related injury. Therefore, Claimant has established that he is totally disabled due to a work related injury.

Suitable Alternative Employment / Partial Disability

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Employer argues that Claimant's disability has become partial because he has established suitable alternative employment. However, based on the medical evidence, this Court finds that Claimant cannot sustain any employment and, therefore, remains permanently totally disabled.

Dr. Manale, Claimant's treating orthopedist, testified that on March 8, 1994 he found Claimant to be functionally disabled from any kind of physical work. He stated that because Claimant has no tolerance to walking or sitting, is taking narcotic medications which depress cerebral function, and is depressed he is not capable of employment. Furthermore, after Dr. Manale's March 3, 1999 examination of Claimant he opined that "sending him back to work is just not going to happen." Additionally, Dr. Manale testified that his medical opinion, as Claimant's treating physician, is that Claimant could not return to work due to his significant organic problem.

Dr. Frigon, Claimant's treating neurologist, testified that as of December 1995 she found that Claimant would not be able to return to gainful employment. She stated that although she had opined on May 1, 1997 that Claimant could sustain the duties of maintenance supervisor, production supervisor, gate guard, and funeral director, she did so based on the guidelines under Arkansas Workers' Compensation law. She opined that the hypertension and emotional problems emanated from his back injury. Dr. Frigon testified that in determining Claimant's ability to sustain employment under the Act, which allows the sequelae of the original injury to be considered, she finds that Claimant could perform only the gate guard position.

The opinion of Dr. Rutherford, who opined on Claimant's ability to perform job opportunities presented by Ms. Seyler on May 1, 1997, is given less weight because he saw Claimant on only two occasions the last being eleven months prior to his opinion. Dr. Martin, who examined Claimant once on March 2, 1999, opined that Claimant could perform the duties of sales person, family services and unarmed gate guard. However, this Court gives less weight to Dr. Martin's opinion as he has only seen Claimant once. Additionally, the therapist who performed the functional capacity evaluation at the Physical Assessment Center, to which Claimant was directed by Dr. Rutherford, questioned whether Claimant could competitively employed.

The only position identified as acceptable by Claimant's treating physician was the gate guard position a position Claimant applied for, but was not hired. Additionally, Claimant's treating neurologist testified that Claimant is not capable of employment. Therefore, after reviewing the duties of the positions, Claimant's restrictions, his physical condition, and his educational and employment background, this Court finds that Employer has not established the existence of suitable alternative employment.

Claimant's willingness to work

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, 661 F.2d at 1043.

Assuming arguendo that this Court had found that Employer had established suitable alternative employment, Claimant would prevail in his quest to establish total disability because this

Court finds that he tried diligently to secure employment. Claimant met with Ms. Seyler, the vocational rehabilitation counselor, and, as testified to by Ms. Seyler, Claimant applied for all positions presented to him on June 27, 1997 by July of 1997.⁵ Additionally, due to Claimant's work related injury he had to be driven to the job applications including those in Monroe.

III. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'd 12 BRBS 65 (1980).

It is undisputed that Claimant is disabled due to a work related injury. Therefore, Employer is responsible for all reasonable and necessary medical expenses which are the natural and unavoidable result of the work injury.

Employer argues that Claimant's stroke is unrelated to his work related injury. However, Dr. Frigon testified that Claimant's stroke was caused in part by his hypertension and decreased activity. She added that individuals with Claimant's profile, going from a very active lifestyle to a very sedentary are more prone to strokes in their forties and fifties. Additionally, Dr. Martin noted that the number one risk factor for strokes is hypertension, particularly the small vessel or lacunar stroke experienced by Claimant. Therefore, this Court finds that Claimant's stroke emanates from his work related injury and, thus, Claimant is to be reimbursed for all reasonable and necessary medical treatment for the stroke.

⁵The only two positions Claimant did not apply for were the two positions for electronics sales persons located in the New Orleans area.

Employer also argues that Claimant's depression is unrelated to his work injury. However, Dr. Frigon testified that Claimant's pain and decreased activity, which emanates from Claimant's injury, is a major component of Claimant's depression. Therefore, this Court finds that Claimant's depression is related to Claimant's work related injury. Thus, Claimant is to be reimbursed for all reasonable and necessary psychiatric treatment for his depression.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from April 22, 1990 until April 23, 1996, the date of maximum medical improvement, based on an average weekly wage of \$620.08.

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from April 24, 1996 and continuing based on an average weekly wage of \$620.08.

(3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

(5) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 1999, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh

